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The Many Conceptions of a Legal System

Citation for published version:

Maher, G 2012, The Many Conceptions of a Legal System. in N Walker (ed.), *MacCormick's Scotland* .
Edinburgh Studies in Law, Edinburgh University Press.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

MacCormick's Scotland

Publisher Rights Statement:

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(Edinburgh Studies in Law). Edinburgh University Press.

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The Many Conceptions of a Legal System

Gerry Maher*

Joseph Raz once wrote a book called *The Concept of a Legal System*, a work intended as an introduction to a general theory of legal system, and as seeking to elucidate the concept of a legal system.¹ However, it is not at all obvious that there is such a thing as *the* concept of legal system. Certainly, in legal discourse the term 'legal system' is used in a variety of contrasting ways. Different perspectives may give emphasis or priority to one or more of these different senses of legal system but it is wrong to assume that there is, or can be, only one concept involved. This paper will draw a sketch of some of the ways in which lawyers talk about legal systems. Whether or not there is a core aspect (or aspects) common to these different conceptions can be determined only once we get clear what each different conception involves. My argument is that there are clearly overlapping elements between some of these conceptions but there is no single common or unifying element; nor is there any good reason for privileging one conception as embodying the sole concept of a legal system.² That is, with one notable exception, personal rather than conceptual in nature. For what all, or at least most, of these conceptions share in common is that they attracted the attention of Neil MacCormick.³

1. Teaching 'Scottish Legal System'

In Scottish law schools most teachers, and all students who study Scots law, are familiar with a course called Scottish Legal System or some very similar variant.⁴

* Most of this paper was written in Scotland but parts were also drafted in Hong Kong; two places, each a part of a larger State but each with its own legal system.

¹ Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1st edn, 1970; 2nd edn, 1980). At page 1 he states that the work involves the 'examination of the presuppositions and implications underlying the fact that every law necessarily belongs to a legal system (the English, or German, or Roman, or Canon Law, or some other legal system).'

² Famously Wittgenstein in describing the idea of family resemblances wrote that 'Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? – Don't say: "There *must* be something common, or they would not be called 'games' " – but *look and see* whether there is anything in common to all.' (Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, 1953), section 66 (emphases in original))

³ In particular, Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005); *Institutions of Law. An Essay in Legal Theory* (Oxford: Oxford University Press, 2007); "Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102; Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism* (Dordrecht: D Reidel Publishing Co, 1986).

⁴ At present (2011) in Edinburgh Law School this class is called Legal Reasoning and Legal System, with no indication that either element is Scottish in focus.

The same sorts of academic course are to be found elsewhere, English Legal System or Irish Legal System, and the like. The content of these courses is typically the same, covering such matters as:

- (i) the sources of law (statute, judicial precedent, custom, works of authority)
- (ii) the institutions of law (parliaments, government executive bodies, courts)
- (iii) the legal professions (advocates, solicitors, lay advisers)
- (iv) legal procedure (civil actions, criminal trial, tribunal hearings).

Many also deal with issues of legal reasoning; provision and funding of legal services; legal history; law reform.

One topic which has perhaps fallen out of fashion is the structure and branches of (a) law and of (b) legal study. The first deals with such matters as the distinctions between international and municipal law, and public and private law, and the subdivisions in each category (for example, public law as consisting of constitutional law, administrative law, criminal law;⁵ private law as made up of law of persons, obligations, property, and adjective law). There are also subjects which cut across these divisions, such as commercial law and EU law. The second area is concerned with the branches and subjects of legal study itself, for example legal history, comparative legal studies, legal philosophy, sociology of law.

This subject is many ways different from all others in a (undergraduate) law degree. It is almost always taken at the very beginning of a student's course of study. But the subject is odd in that it does not replicate any subject or branch of the law used in legal practice, at least in the sense of comprising a legal category which may be the focus of legal argument or judicial decision.⁶ As expressed in one of the first books on the Scottish Legal System, the subject (and the book):⁷

is intended not as a first or general introductory course on Scots Law itself, but as an attempt to tackle the problem of teaching the novice law student how to go about the study of law and an attempt to equip him [*sic*] to do so. It is an introduction to the *study*, not to the law itself.

⁵ Many academics, and virtually all students, forget that on any definition of public law criminal law is par excellence part of that law.

⁶ There are, of course, statutes and judicial decisions on the topics covered by Legal System courses, such as the provisions of the Constitutional Reform Act 2005 which established the Supreme Court of the United Kingdom but such laws are usually characterised as belonging to Constitutional Law rather Legal System. Likewise with case law. The case of *Jessop v Stevenson* 1988 J.C. 17, which involved an important issue of judicial precedent, is reported under the general headings of 'administration of justice' and 'procedure'.

⁷ D. M. Walker, *The Scottish Legal System* (Edinburgh: W Green & Son, 1st edn, 1959), p v (emphasis in original). The passage is repeated in the preface to all subsequent editions, the last (8th) of which was published in 2001.

So why are such academic courses generally named Legal System and why also 'Scottish'? These are issues generally not considered by the standard texts on the subject.⁸ Yet again, the exception is Walker's *Scottish Legal System*. In an Introduction, missing from the first 3 editions, a legal system is described as a general name for the complex of institutions, ideas, techniques and methods, covered in the book.⁹ It is Scottish in the sense that it 'exists in relation to the people living in Scotland.' What is more, the Scottish legal system coexists and interacts with social, political, economic and other systems in the community.

This definition is far from ideal. It fails to explain the nature of the academic subject as involving a 'legal system' but it does usefully suggest that what is taught in that course uses a range of conceptions of legal system (some of which will be examined below). Perhaps that is as far as this conception of Legal System can be taken. Law teachers group together diverse topics, some of which are, or involve, legal systems in other senses, which are seen as necessary or useful in introducing students to the study of law. The systematic or systemic nature lies precisely in that grouping together.

2. Legal systems and legal structures

A second sense of legal system has its home in analytical jurisprudence, in for example the writings of Kelsen, Hart and Raz.¹⁰ What is important about laws, at least in their paradigmatic sense, is that they are related to each other in certain structural ways. Two issues are involved in this approach. What is the individual unit making up a single law (the form of the norm)? And secondly, what is the exact nature of the relationship between different norms? Legal theorists present quite different answers to these questions, but the conception of legal system remains much the same.

For Kelsen, each legal norm has a fixed form, which rarely if ever corresponds to the form of laws enacted by legislatures or established by courts. Rather the point of legal science is to show the logical structure of every norm, which for Kelsen is an authorisation of a legal sanction to be applied whenever a certain

⁸ The issue is not mentioned in A. A. Paterson, T. StJ. N. Bates & M. Poustie, *The Legal System of Scotland* (Edinburgh: W Green & Son, 4th edn, 1999) who begin their book (p vii) by noting that a 'legal system is the product of its time' but do not explain what conception or conceptions of legal system is being talked about.

⁹ 4th edition (1976), p 1.

¹⁰ Especially, Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1945); Hans Kelsen, *The Pure Theory of Law* (Berkeley and Los Angeles: University of California Press, 1967); H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd edn, 1994); J. Raz, op. cit. above at note 1.

form of conduct has taken place. But legal norms have other characteristics, the most important of which is their validity. A norm is valid if it is authorised by some other norm; that other norm in turn depends for its validity on yet another norm. This point is important for it stresses that every legal unit is linked in some way to others, and ultimately to a set of basic constitutional norms. To provide order and meaning to this multiplicity of laws legal science uses various logical principles, which can be summed up as the theorem of the basic norm. In a narrower sense the basic norm is a logical presupposition of any theorist trying to understand legal units as having validity but in a wider sense it also incorporates other principles such as that of non-contradiction, and *lex posterior derogat priori*.¹¹ Kelsen is clear on one point at least; to know and understand law we must interpret it as a meaningful ordering of legal norms.

A similar but looser conception of legal system is used by Hart. But one immediate point of difference is Hart's insistence that there need not be any one form of a law unit. Hart insists that rules can serve distinct social functions, such as those conferring powers and those imposing duties, and there is no theoretical gain in insisting that these distinctions should be collapsed into one form of law. Indeed, Hart's work combines a number of contrasting perspectives, some of which are focused on a sociological account of how law operates and the language used to capture its functions.¹² For example, in his discussion of secondary rules such as rules of change and rules of adjudication he can be seen as focusing on social-legal institutions such as legislatures and courts.¹³

But it is equally the case that Hart also deploys a conception of legal system very much like Kelsen's. For Hart argues that a necessary feature of any legal system is a rule of recognition which sets out the criteria for the validity of all rules in a system and as such constitutes the unity and coherence of the system in question.

A more detailed version of a structural conception of a legal system is to be found in the writings of Joseph Raz. One key point in Raz's analysis is the presentation of a much richer model of the basic legal unit (what he calls the individuation of laws).¹⁴ For example, he argues that individuated laws should make clear important connections between various parts of a legal system. A perhaps even more fundamental insight into the nature of a legal system is that not every legal unit

¹¹ This approach to the basic norm is most evident in the *Pure Theory of Law*, pp 201-208.

¹² Hart himself described *The Concept of Law* (at page v) as 'an essay in descriptive sociology.'

¹³ Hart, *Ibid.*, pp 94-96.

¹⁴ Raz, *op cit* at footnote 1, pp 140-147.

in a legal system is necessarily a legal norm.¹⁵ Raz argues that there are laws which are not themselves norms but which concern the existence or application of legal norms. This 'internal' relationship brings out the systemic nature of law. The structure of a legal system is based on the relationship between different types of legal unit.

What is point of conceptualising a legal system of this sort? For a start, it offers logical insight into a deeper structure of law. However, its value lies not just in clearer thinking in analytical jurisprudence. Many of the writers who have explored this conception of legal system, have also argued that it connects to wider inquiries about law. Even Kelsen, who insisted on the purity of legal science, pointed out that the value of seeing law as part of a legal science is that this perspective presents law as a meaningful system of basic legal units. The function of the 'pure' legal scientist is to give law a specific form of interpretation.

This approach is even more evident in other writers in the analytical tradition. Hart, of course, is renowned for his use of the internal perspective as a way of locating meaning to law.¹⁶ Significantly, Raz, whose version of the analytical conception of legal system is highly sophisticated, linked his work in this area to the topics of his own later interest of law and practical reasoning.¹⁷

Note must also be made of a much more refined approach to this conception of legal system to be found in the writings of Neil MacCormick.¹⁸ He argues for a version of the analytical approach but one which uses an 'institutional' sense of legal system. MacCormick accepted the idea of a basic legal unit as constituent parts of a legal system but argued that approaches such as those of Kelsen or Raz fail to locate what is truly systematic about law. Rather, legal rules are grouped into certain forms or institutions, which have a subject-matter unity; examples are ownership, promises, delicts, trusts, theft. Each such legal institution itself is made up of rules with different logical functions, namely rules which indicate how specific instances of each concept is brought into being, rules indicating the legal consequences of each instance of the concept, and rules on how any specific instance comes to an end.

¹⁵ See especially *ibid.*, pp 169-170.

¹⁶ In *The Concept of Law*, Hart adopts the writings of Peter Winch (*The Idea of a Social Science* (London: Routledge and Kegan Paul, 1958)). Winch's work in turn derives much from Wittgenstein. However there is an argument that Hart's approach was influenced as much by Weberian notions of *Verstehen*. See further Nicola Lacey, *A Life of H. L. A. Hart* (Oxford: Oxford University Press, 2004), pp 229-231.

¹⁷ Raz, *op. cit.*, at note 1, 2nd edition, pp 210-216.

¹⁸ MacCormick once wrote that it 'is one objective, perhaps the objective, of analytical legal philosophy to explain the structure of legal systems.' ("Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102, 121.

For MacCormick such organising concepts are crucial to knowing the law and understanding its functions:¹⁹

The whole point of postulating the existence of instances of such concepts is that it enables us to achieve two potentially conflicting goals in the exposition of law. On the one hand, we can break down complex bodies of legal material into comparatively simple sets of interrelated rules; and yet on the other hand we can treat large bodies of law in an organised and generalised way, not just as a mass of bits and pieces.

What is to be noted about this institutional approach to law is that it uses the same general idea of legal system as, for example, in Kelsen, that is, an ordered relationship between components of each system. The radical difference is that for MacCormick the individual parts are to be seen as much more complicated in nature. But this difference is not simply one of identifying the appropriate analytical units. Rather for MacCormick, there is a major theoretical significance in using units of institutional fact as the building block of a legal system, namely that doing so captures a social reality about the significance of law as normative, that is as guiding social action.

3. A sociological conception of legal system

The works of Hart and MacCormick indicate a further sense of legal system. For Kelsen and Raz, a legal system is essentially a logical concept, used in explaining the structural properties of laws and legal units.

But a quite different idea is the sociological sense of legal system. In this sense the term 'legal system' refers to the operations of a number of social institutions which perform various roles and practices in relation to the making and application of standards that function as guides to general social behaviour. In other words, a sociological sense of legal system is concerned with special types of social action (institutionalised action) which has a certain subject-matter, namely law.

This sense can be called 'sociological' because it is concerned with the conditions for the existence of a particular mode of social action and social control. But this is a familiar conception of legal system for academic lawyers. When in the class of Legal System we teach the courts or the legal profession our concern is not only (or primarily) with the legal rules about how these institutions are constituted but more with how they actually operate and with the social and political dynamics of their operation.

¹⁹ "Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102, 108.

Moreover, this sense of legal system is also a central one in legal theory and used not only by writers who are dealing with the social-legal studies (the sociology of the legal profession and the like) but also by jurists concerned with more theoretical aspects of law.

For example, much of Hart's writings on legal system combine both the analytical-logical sense with the sociological sense. In a celebrated passage in *The Concept of Law* Hart poses the question of what a society would be like that lacked 'a legislature, courts or officials of any kind.'²⁰ The purpose of constructing this model is to show those features of a modern legal system that distinguishes it from a simple regime of social rules. In such a regime there would be no easy way of introducing new rules or interpreting and enforcing existing ones. And the remedy is the introduction of institutions with precisely those functions. What he seems to be saying is that the characteristic mark of law (or a legal system) is the existence of such specialised institutions. The problem in reading Hart is that he tends to talk about rules (secondary rules)²¹ rather than institutions. The outcome is that it is far from clear whether Hart has in mind a sociological notion of legal system or an analytical-logical one.

Hart seems to be putting forward two separate claims. One is that what constitutes a (or the) step from the pre-legal to the legal world is the development of these secondary rules the existence of which indicates the existence of specialised institutions. The other is that in every legal system there is always one fundamental rule which is the ultimate reason for the validity of all other rules of the system. But there is no necessary connection between these two claims. The importance of this point is that the two claims use different conceptions of legal system. Indeed one can argue without absurdity that legal standards are not 'systematic or 'systemic' in that it is simply not possible to arrange them in an ordered pattern without at the same time having to deny that 'legal systems' exist where we are referring to particular types of social roles and social action.²²

A similar, though perhaps clearer, approach was taken by Neil MacCormick, who had always noted a distinction between the logical (or juristic) and the sociological senses of institutions.²³ In addition to the analytical idea of legal

²⁰ *The Concept of Law*, p 89.

²¹ He mentions rules of change, rules of adjudication and the rule of recognition.

²² That Hart has moved in his discussion of the rule of recognition from a sociological to a structural perspective is evidenced by the fact that there is no social-legal institution that corresponds to the rule of recognition in the way that legislatures and courts correspond respectively to rules of change and rules of adjudication.

²³ In talking of institutions and institutional fact he wrote: 'there are two quite distinct points to be made by the use of such words in relation to law, a philosophical and a sociological one;

institutions which is used to explain structural properties of a legal system, there is a wide variety of social systems or institutions, a sub-category of which are legal institutions such as courts, police forces, the Faculty of Advocates and the like (what in total might be called a 'legal system'). But the ambiguity of the term legal institution is purely a linguistic one; the two ideas are conceptually distinct. He makes the point that social, or informal, rules (such as those involved with the practice of forming a queue) provide a way in which people can order their actions and interactions. A crucial aspect of these rules is that they provide reasons for assessing the correctness or appropriateness of how everyone acts, a situation MacCormick calls 'normative order'. But law is a special form of normative order, an institutional order. This sense of institution refers not to the rule-based categories necessary for understanding the structure of legal systems but on the existence of institutional agencies such as legislatures or courts, each with specialised roles within a legal system.²⁴

It must be said, however, that as with Hart, MacCormick is never entirely clear whether he sees these agencies as in themselves forming a conception of legal system, that is in its sociological sense, or whether they are simply a subset of the special legal institutions which make up a logical sense of legal system.²⁵

4. Legal systems and legal doctrine

A further conception of legal order or legal system is concerned with the activity of legal exposition. The actual content of the law of any legal system is made up of laws derived from legal sources, usually at different levels such as statute, case law and so on. Moreover, these rules will develop and multiply over time. An important and specific task of the jurist is to describe these rules intelligibly, by presenting them in

they depend upon different senses of the terms involved, which I suspect have often been more or less confused in discourse about law.' ("Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102, at 108) Elsewhere he noted a further sense of institution, namely that used to describe a particular manner of exposition of the law (see *Institutions of Law. An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), pp 12-13). See further the discussion at section 4 below.

²⁴ 'There are distinct public institutions – "institutional-agencies" let us call them – charged with legislative functions, with adjudicative functions, with executive-administrative functions, and law-enforcement functions. Crucial to the coherent unity of the state [sic] to which these institutions belong is their effective co-ordination and balanced interaction in performing their functions.' (*Institutions of Law. An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), p 35). There is an irony that MacCormick refers to a state rather than a legal system. See the discussion of the identity of legal systems at section 5 below

²⁵ He does accept that there are legal 'institutions' which are primarily of concern to the sociology of law ("Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102, 110; 129) but he also analyses these institutions in terms of the triadic structure (as consisting of institutive, consequential and terminative rules) used in the analytical sense (see *Institutions of Law*, pp 36-37).

an ordered and coherent way.²⁶ Examples of this approach to legal ordering are legion, ranging from the work of the Roman law jurists to modern academic writings.

Indeed, the approach taken by Roman lawyers, as exemplified in the Institutes of Gaius and Justinian, created a tradition of legal exposition which had a profound influence on legal writing in many parts of Europe, including England and Scotland. The major characteristic of such institutional writings was the division of law into broad organising categories, most significantly the distinct branches of the law of persons, things and actions. This tripartite division had a profound historical influence and was reproduced as the general organising categories of works such as Stair's *Institutions of the Law of Scotland* and Blackstone's *Commentaries on the Laws of England* and on codifications such as French *Code Civil* of 1804 and the German *Bürgerliches Gesetzbuch* of 1900, both of which in turn influenced the development of legal codes throughout the world.

Stair's book deserves a special mention for the use made of a nuanced approach to the classical distinctions, for Stair advanced a further refinement whereby the focal element within each of the three broad branches of law of Scotland was the idea of rights.²⁷

Furthermore the task of ordering and systematising laws has applied not only to general bodies of law but also to more specific subjects. At times this work is truly revolutionary, revealing a deep structure to a mass of seemingly unrelated rules which can now be seen to be as forming part of one subject. For example, *The Law of Restitution* by Lord Goff of Chieveley and Gareth Jones²⁸ introduced a general concept of unjustified enrichment into English law.

Two further examples can be seen in the writings of two of Neil MacCormick's colleagues at Edinburgh Law School. Prior to the publication of Gerald Gordon's book on *The Criminal Law of Scotland*²⁹ Scots criminal law had lost any sense of structure or cohesion. But this book changed the subject. It drew upon philosophical writings (such as Ryle and Wittgenstein) and re-interpreted existing Scottish rules from the perspectives of Anglo-American writings on concepts such as mens rea and

²⁶ In this discussion of legal system as legal ordering the focus is on juristic writings but a similar idea also applies to law making (especially codification) and to law reform. By statute the duty of the Law Commissions in the United Kingdom is 'to take and keep under review all the law with which they are respectively concerned with a view to its *systematic* development and reform.' (Law Commissions Act 1965, s 3(1).) (Emphasis added.)

²⁷ An analysis advanced by AH Campbell, *The Structure of Stair's Institutions* (Glasgow: Jackson, 1954), a writing which influenced certain themes in Hart's *The Concept of Law*. For further discussion of Stair's use of the classical division of law, see Stair, *The Institutions of the Law of Scotland* (Edinburgh University Press & University of Glasgow Press, 1981 edn, by D. M. Walker), 'Introduction by D. M. Walker, pp 17-20.

²⁸ 1st edition, 1966 (London: Sweet & Maxwell).

²⁹ 1st edition, 1967 (Edinburgh: W Green & Son).

causation. A similar tale can be told of property law in Scotland. The rules governing such matters as rights in land or in corporeal and incorporeal moveables were generally known, but the rules were seen as disparate and lacking any unifying element. All this was changed with the publication of the work of Kenneth Reid, who pointed out that there is a unitary law of property, based on the fundamental distinction between real rights and personal rights.³⁰

There may be some connections between this sense of legal system and others. Indeed, MacCormick and Weinberger once claimed that a 'structural theory furnishes legal dogmatics with schemata for the exposition of the substance of the laws.'³¹ However, for this conception of legal system what is a key aspect of order and system is making sense of what legal rules and principles say, and something more than attention to structure alone is required. What gives order to a body of legal rules is substantive coherence. But here again this requirement is not too far removed from Neil MacCormick's legal theorising, for a key concept in his writings on legal reasoning is that of coherence.³² For laws to guide conduct they must be ordered and for them to be ordered they must be expressed in terms of values. Although MacCormick's main concern was with judicial reasoning, his approach to coherence applies equally to the task of legal dogmatics. To revert to one of the examples mentioned earlier, Gerald Gordon could make sense of, and impose order on, Scottish rules of criminal responsibility by presenting them in terms of a mainly (though not entirely) subjective approach to mens rea.

5. Legal system and identity: is there a Scottish Legal System?

It may seem obvious that there is such a thing as the Scottish Legal System. After all, as noted earlier, many law schools teach a course which has that name. Moreover, it is even more obvious that in Scotland there are legal institutions such as a parliament, courts, police forces and so on; and there are legal rules on all manner of topics, such as property, family law, criminal law and the like. But what does it mean to say that there is a Scottish legal system, which has its own distinctive identity? The existence of legal institutions and of legal norms is not enough, for the same

³⁰ Stair Memorial Encyclopaedia, vol 18 PROPERTY (1993). Reid was the principal author of Part I of that title on General Law and wrote the introductory sections which set out the arguments for the internal coherence of the subject.

³¹ Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism* (Dordrecht: D Reidel Publishing Co, 1986), p. 17.

³² *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), ch 7; *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005), ch 10, where he develops in some detail the idea of 'normative' coherence, as contrasted with 'narrative' coherence which is concerned with reasoning in fact-finding.

could be said about Glasgow or the Highlands, yet it does not make sense to talk about the Glasgow or the Highlands legal systems, at least in the sense of their having distinct identities.

For a long time these questions were given a short and simple answer: the identity of a legal system derived from the identity of a state, an approach which was buttressed by analytical jurisprudence such as Kelsen and Hart. But analytical jurisprudence gives rise to paradoxes when dealing with issues of the identity of legal systems. A key aspect of the analytical conception of legal system is that each rule of a system receives its ultimate validity from a fundamental rule or norm, which is (or concerns) a rule or set of rules of a constitution. So a theory of identity can be based on the premise that for each distinct basic norm or rule of recognition; there is a separate and distinct legal system made up of all the rules which derive from that norm or rule.³³ But in certain contexts this conclusion gives odd results. Assuming that there is a fundamental rule about the constitution of the United Kingdom means that there is a UK (British) legal system. But if that is so, then it would not make sense to talk about a Scottish (or indeed an English) legal system. This approach is unattractive for we intuitively at least want to be able to talk of both a UK and a Scottish legal system.³⁴

But if it is the case that the analytical jurisprudence conception of legal system does not allow for the combined existence of a British legal system and a Scottish legal system, then the solution is to use a different sense of legal system in discussing identity. One possible candidate is a legal system in terms of its substantive (i.e. content-based) distinctiveness. Scots law, it is said, is distinctive and different from, for example, English law because of its adherence to principle (as opposed to rigid case law) and historical-conceptual links to Roman law. Certainly these characteristics of Scots law have for a long time been used in arguments about the distinctiveness of the Scottish legal system. But other systems also use or were historically influenced by Roman law, so some other criterion must provide the clue to identity. If anything, substantive similarities in the law point to the demarcation of different legal families or cultures but not to specific units or legal systems within these categories.

³³ See on this form of argument, Neil MacCormick, "Does the United Kingdom have a Constitution? Reflections on *MacCormick v Lord Advocate*" (1978) *Northern Ireland Legal Quarterly* 1, 15-18.

³⁴ Indeed the legislation setting up the Supreme Court of the United Kingdom states that 'Nothing in this Part is to affect the distinctions between the separate legal systems of the parts of the United Kingdom.' (Constitutional Reform Act 2005, s 41(1).)

A more fruitful approach is to look to the sociological sense of legal system. If it is the case that courts or the legal profession see themselves as having a distinct identity, and this was true of much of the history of Scotland from the 18th Century onwards, then this argues for a distinct identity of a Scottish legal system in that sense. The effect is to locate issues of the identity of the Scottish legal system in more general questions of Scottish identity and involves consideration of the 'Scottishness' of Scotland's political, educational, economic, and cultural systems.³⁵

6. Legal system as a 'country': the Scottish Legal System and international private law

A final sense of legal system is to be found in international private law (IPL). That subject lays down rules that, for example, specify the courts of which legal system have jurisdiction to try a case, or the laws of which legal system are to be applied in resolving a legal dispute. But IPL uses a distinctive conception of legal system. The IPL world is divided up not into states in the sense of public international law but into units known as legal systems or countries. But there is no obvious basis for the rules as to the identity of these countries. Thus for most IPL purposes,³⁶ there is no such thing as Britain or a British legal system; rather there are the separate countries of Scotland, England and Wales, and Northern Ireland. Likewise the USA is divided into the 50 countries of New York, Maryland and so on. A similar approach applies to the constituent parts of Canada and Australia. Yet Germany is one country for IPL purposes, as is Spain or Brazil.

Certainly this sense of legal system is recognised in IPL sources and instruments. For example, the Civil Jurisdiction and Judgments Act 1982 applied a modified version of the 1968 EC Brussels Judgments Convention to allocation of jurisdiction between the different 'parts' of the United Kingdom, which are defined as meaning England and Wales, Scotland and Northern Ireland.³⁷

³⁵ For a rudimentary statement of this argument, see G Maher, "The Identity of the Scottish Legal System" 1977 *Juridical Review* 21. For a detailed discussion of the distinctiveness of the Scottish political system as an aspect of a more general Scottish culture, see Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), chs 11 & 12. See also W. J. M. Mackenzie, *Political Identity* (Harmondsworth: Penguin Books, 1978), especially pp. 15-16; 170-172.

³⁶ There are occasional exceptions where for certain very specific issues the appropriate legal unit is the United Kingdom, Australia or Canada. See Dicey Morris & Collins, *The Conflict of Laws* (14th edn, 2006; Oxford: Oxford University Press), p 30.

³⁷ 1982 Act, section 16 and Schedule 4 as read with section 50. Many instruments which recognise that some States may have more than one IPL country provide that the State does not have to apply the provisions of the instrument in case involving conflicts only between those different countries. See, for example, Rome I Regulation (Regulation (EC) 593/2008 on the law applicable to contractual obligations ([2008] OJ L177/6), article 22(2): 'A Member State where different territorial units have their own rules in respect of contractual obligations

Furthermore many IPL conventions and EU regulations contain provisions like the following:³⁸

Non-unified legal systems

(1) In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention -

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;

c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

The problem with these provisions is that they do not provide any criteria for determining which states have different countries in an IPL sense, but seem to take for granted that this phenomenon exists. Some versions hint more strongly at a content-based difference. For example the (EU) Rome I Regulation on contractual obligations states that:³⁹

Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

But this provision cannot mean that there are different countries within one state only where the law of contract differs. Contract law in Northern Ireland is much the same as that in England and Wales, but these remain different IPL countries.

A further level of the analysis of this idea of a country is that some states (for example, Spain and China) that are themselves countries in the IPL sense have rules

shall not be required to apply this Regulation to conflicts solely between the laws of such units.'

³⁸ Hague Convention on Choice of Court Agreements (2005), article 25. Provisions of this sort are to be found in most of the conventions made under the auspices of the Hague Conference on Private International Law. See, for example, the 1980 Convention of International Child Abduction, articles 31 and 32.

³⁹ Rome I Regulation, article 22(1). See also Rome II Regulation (Regulation (EC) 864/2007 on the law applicable to non-contractual obligations ([2007] OJ L199/40), article 25. The provision in the Rome I Regulation was based on an earlier version of that instrument (The Rome Convention (1980)). An official report on that Convention simply explains the provision with an example: 'If, for example, in the case of Article 4, the party who is to effect the performance which is characteristic of the contract has his habitual residence in Scotland, it is with Scottish law that the contract will be deemed to be most closely connected.' (Giuliano-Lagarde Report (OJ C282 (31.10.80) 4, p 38.)

which deal with 'internal' conflict of laws. These provisions are usually referred to as involving 'inter-regional' conflict of laws and apply the same or a modified version of international IPL rules to issues between different autonomous areas within the State.⁴⁰ Although such areas are legal systems of sorts, for international IPL purposes they are not full countries in the way that Scotland or New York are. Their exact characterisation remains problematic.

Clearly, there is work still to be done on the conception of legal system used in IPL.⁴¹ What may be surmised at this stage is that none of the other notions of legal system considered earlier in this paper is likely to be dispositive (or even perhaps of any use at all) in clarifying the meaning of a country for IPL purposes. But this should be no surprise. The subject of IPL has its own distinctive issues and problems, and uses a range of special concepts and principles in dealing with them. There is accordingly no theoretical or practical need for the conception of legal system which is appropriate to that subject to be identical to any other sense of legal system.

⁴⁰ This has long been a feature of Spanish law and predates the more modern development of autonomous regions. See L Neville Brown, "The Sources of Spanish Civil Law" (1956) 5 *International and Comparative Law Quarterly* 364-377, 372-377. For discussion of the approach in China, see Guobin Zhu, "'Inter-Regional Conflict of Laws Under 'One Country, Two Systems' " (2002) 32 *Hong Kong Law Journal* 615-676.

⁴¹ The pity is that IPL, despite the range of conceptual puzzles which the subject gives rise to, was an area of the law which Neil MacCormick did not appear to have noted or discussed. For a brief treatment, see Neil MacCormick, "The Maastricht-Urteil: sovereignty now" (1995) 1(3) *European Law Journal* 259-266 at 262-263.